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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 671

V. B. KINNEY, SECRETARY OF LABOR OF THE STATE OF NEBRASKA,

Petitioner,

v.

STATE OF NEBRASKA, *ex rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE,

Respondents.

BRIEF FOR RESPONDENTS

WALTER GORDON MERRITT,
Counsel for Respondents.

APPELLATE LAW PRINTERS, INC., 103 Lafayette Street, N. Y.
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STATE OF NEBRASKA, *ex rel.* WESTERN REFERENCE & BOND ASSOCIATION, INC.; MILLS TEACHERS AGENCY; THOMAS EMPLOYMENT SERVICE; CO-OPERATIVE REFERENCE COMPANY; MARTI REFERENCE COMPANY; WATTS REFERENCE COMPANY; CORNHUSKER TEACHERS BUREAU; GRACE BOOMER; and DAVIS SCHOOL SERVICE,

Respondents.

No. 671

BRIEF FOR RESPONDENTS.

Statement.

This case is before this Court on certiorari granted March 3, 1941.

Petitioner seeks a decision overruling *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913 (1928), and reversing an order of the Supreme Court of Nebraska directing the issuance of peremptory writ of mandamus (petition for certiorari, pp. 4-5, 15-16). The mandamus was to command the Secre-

tary of Labor of the State of Nebraska to issue to the Western Reference & Bond Association, Inc., and to the other respondents, licenses to operate private employment agencies for the year commencing May 1, 1940 (R. 8-9). The license was withheld because of the refusal to comply with the requirements of Section 48-508, Compiled Statutes of Nebraska, 1929, limiting the maximum compensation of an employment agency to ten per cent of the first month's salary or wages of the person for whom employment was obtained (R. 10). On motion of the agencies for judgment on the pleadings the Supreme Court of the State of Nebraska held, under the authority of *Ribnik* v. *McBride, supra*, that the part of the Statute imposing this requirement was unconstitutional in that it contravened the due process clause of the Fourteenth Amendment (R. 19).

The entire section of the statute in question appears as an appendix to this brief.

The business of the respondent employment agencies is described in the record as follows:

> "Soliciting and securing positions for clerical, executive, technical, and professional workers and * * * not * * * for common laborers, domestic servants or other classes of unskilled workers" (R. 6).

The original petition sets forth the refusal of the Secretary of Labor to issue the license on the ground that the agency would not agree to observe the price-fixing provisions of the statute and further alleges that these provisions are unconstitutional (R. 2-3). The answer of the Secretary of Labor alleges in substance that he refused the license because the agency had violated, and threatened to continue to violate, said price fixing provisions and denies that these provisions are in derogation of rights guaranteed by the Constitutions of the State of Nebraska or of the United States (R. 4-5). The answer alleges further that

the business of a private employment agency is vitally affected with a public interest and that the legislature may in the exercise of the police power regulate the maximum fees to be exacted from an employee applicant (R. 5).

The stipulation entered into between the parties (R. 7), stating the issue in the cause, provides as follows:

> "* * * that the sole and only issue for determination in the above entitled cause is the constitutionality of Sections 48-508, Compiled Statutes of Nebraska for 1929, in so far as the same fixes or limits the fees or compensation of private employment agencies."

The opinion of the State Court describes the general nature of the industry in question, the enlarged amount of subsidized competition to which it is subjected, and the hopeless impracticability of establishing a uniform fee for a valuable service and less valuable service within the limits of constitutional power (R. 18).

No evidence was taken.

ARGUMENT

POINT I.

Section 48-508 of the Compiled Statutes of Nebraska, 1929, as applied to the respondents, is arbitrary and a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, the Court had before it a New Jersey Statute, which gave the State Commissioner of Labor the power to approve or disapprove a schedule of fees proposed to be charged by any employment agency seeking a license. It

appeared that the Commissioner had rejected Ribnik's application for a license, on the ground that the fees proposed to be charged were in certain respects excessive and unreasonable.

The opening paragraph of the dissenting opinion of Mr. Justice STONE, at page 359 stated the question before the Court, as follows:

> "The question is whether a state has constitutional power to require employment agencies to charge only reasonable fees for their services to those seeking employment. As the case is presented we must take it that the New Jersey Commissioner of Labor was right in holding that Ribnik's list of fees was unreasonably high."

In the case at bar, the fee-fixing provisions of Section 48-508 of the Compiled Statutes of Nebraska, 1929, first deal with a registration fee, which is not to exceed $2.00.

The pertinent provisions of the Section, which are at issue, begin as follows:

> "No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, *'The amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer.'* " (See this brief pp. 29-30). (Emphasis supplied.)

The Section also provides that if, through no fault of the employee, he fails to remain in service with the employer, and other positions are furnished to him by the agency, then said agency shall not accept more than one fee for every three months (this brief, p. 30).

The Section also provides:

> "In the event that the position, so tendered, is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor." (This brief, p. 30).

Apparently, the restitution required by the provision just above quoted must be made even if the employee arbitrarily or capriciously refused to accept a satisfactory position procured for him by the agency.

The Section also provides:

> "If an employee furnished fails to remain one week in a situation through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand" (this brief, p. 31).

Thus, it appears that the Act imposes a maximum limit on the fees to be charged, and forbids the exaction of any other "compensation or reward", regardless of the amount of service rendered, or the moneys expended in order to place the employee. Moreover, if the employee arbitrarily or capriciously rejects the position offered, any fee paid beyond the registration fee must be returned. If the employee remains less than a week in the job, whether due to

his own fault or the fault of his employer, the agency is required to repay all fees in excess of the registration fee, either to the employee or his employer, as the case may be.

We submit that this Statute upon its face—and particularly as applied to executive, technical and professional employment—is far more arbitrary and unreasonable than was the statute involved in the *Ribnik* case, and is clearly in violation of the due process provisions of the Fourteenth Amendment. In fact, there is little in the dissenting opinion of *Ribnik* v. *McBride* to support the validity of such an arbitrary act.

The petitioner, realizing that the case of *Ribnik* v. *McBride* presents a barrier to his contentions, frankly asks this Court to treat that decision as overruled.

The *Ribnik* case has stood for twelve years. It has been recognized as established law by citation and discussion in many subsequent cases in this Court and has never been disapproved or overruled by this Court.

Williams v. Standard Oil Co., 278 U. S. 235, 239, 73 L. ed. 287, 308;

Tagg Bros v. *United States*, 280 U. S. 420, 438-9, 74 L. ed. 524, 534;

Near v. *Minnesota Ex Rel. Olson*, 283 U. S. 697, 707-8, 75 L. ed. 1357, 1363;

Nebbia v. *New York*, 291 U. S. 502, 536-7, 78 L. ed. 940, 957;

Old Dearborn Distributing Co. v. *Seagram-Distillers Corporation*, 299 U. S. 183, 192, 81 L. ed. 109, 118;

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 570, 83 L. ed. 1446, 1468.

Since the petitioner is asking this Court to overrule this decision, the problem presented cannot be met solely by analysis of decisions before and since the *Ribnik* case. It involves a fresh consideration of the effect of our written

Constitution in protecting our free economy and individual rights against legislative invasion.

It is submitted, notwithstanding the fact that the case of *Adkins* v. *The Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, has been overruled, that the fundamental principle laid down therein is still sound. That principle was stated at page 546 as follows:

> "But freedom of contract is nevertheless the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

This language is quoted with approval in *Chas. Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 534, 67 L. ed. 1103, 1108, and *Chas. Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, 566, 69 L. ed. 785, 790.

In the first *Wolff Packing* case it is stated that before such legislation can be upheld it must appear that the industry must "have come to hold such a peculiar relation to the public that this is superimposed upon them" (p. 535).

The Chief Justice, in his dissenting opinion in the *Adkins* case, referred to the necessity of "pricking out a line" as to the "boundary of the police power" in such cases. Both Mr. Justice SUTHERLAND in the prevailing opinion and Mr. Justice STONE in the dissenting opinion in the *Ribnik* case applied the test that whether a business is affected with a public interest turns "upon the existence of conditions peculiar to the business under consideration" (277 U. S. 355-6, 362, 72 L. ed. 915, 918).

Again, in *Liggett* v. *Baldridge*, 278 U. S. 105, 111, 73 L. ed. 204, 208, the Court referred to the fact that regulations impairing freedom of contract must be declared unconstitutional, unless "justified as a valid exercise of the police power."

In the case of *Nebbia* v. *New York*, 291 U. S. 502, 78 L. ed. 940, which involved the Milk Control Act of the State of New York with its price-fixing features, this Court said, at page 523:

> "Under our form of Government the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference."

In the case of *Old Dearborn Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 192, 81 L. ed. 109, 118, this Court said:

> "Appellants invoke the well-settled general principle that the right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U. S. 418, 429, 71 L. ed. 718, 722, 47 S. Ct. 426, 58 A. L. R. 1236; Chas. Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 537, 67 L. ed. 1103, 1109, 43 S. Ct. 630, 27 A. L. R. 1280; Ribnik v. McBride, 277 U. S. 350, 72 L. ed. 913, 48 S. Ct. 545, 56 A. L. R. 1327; Williams v. Standard Oil Co., 278 U. S. 235, 73 L. ed. 287, 49 S. Ct. 115, 60 A. L. R. 596; New State Ice Co. v. Liebmann, 285 U. S. 262, 76 L. ed. 74 52 S. Ct. 371. These cases hold that, with certain exceptions, which need not now be set forth, this right of the owner cannot be denied by legislative enactment fixing prices and compelling such owner to adhere to them."

We, therefore, submit that special circumstances creating exceptions must first be shown to support the validity of any such drastic regulation as price-fixing. Such circumstances, or lack of such circumstances, in some cases may appear from the inherent nature of the subject matter so regulated, while in other cases the burden is on him who

challenges the validity of the act. For illustration, the contention that a law is unconstitutional because it is confiscatory must be supported by evidence to that effect. On the other hand, if it appears that the attempted regulation extends into a field which, by its inherent nature, or as a matter of law, is beyond the reach of constitutional power, no outside evidence is required. See *Liggett Co. v. Baldridge,* 278 U. S. 105, 78 L. ed. 204. In the case at bar, we submit that a presumption naturally arises from the previous decision of the Court in the *Ribnik* case, that legislative price-fixing, as applied to employment exchanges, is arbitrary and unreasonable and that the burden of overcoming that presumption rests upon the petitioner in this case.

The difference between fixing maximum charges for commodities and maximum charges for services is not one to be ignored. On the whole, we submit that this Court—as in the past—should be cautious in recognizing legislative power to fix maximum charges for personal services, for if the power to fix maximum wages is added to the power to fix minimum wages, there is little left of the personal liberty to make contracts, which is both a right of liberty and property. Can it be said that fixing maximum fees for securing positions for executive, technical and professional workers is any more subject to legislative control than are the salaries of such classes of workers? These occupations involve a class of people who have not been thought to be in need of special protection from exploitation. The Fair Labor Standards Act of 1938 (Section 13) exempts executive, administrative and professional groups (29 U. S. C. A. Section 213).

As was said by this Court, through the Chief Justice in *Near* v. *Minnesota,* 283 U. S. 697, 708, 75 L. ed. 1357, 1363,

> "The power of the state stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages."

The important cases in this Court dealing with legislative power to fix maximum compensation for personal services are few in number, and easily distinguishable from the case at bar, by reason of special circumstances.

In *Tyson & Brother* v. *Banton*, 273 U. S. 418, 71 L. ed. 718, and *Ribnik* v. *McBride*, 277 U. S. 350, 72 L. ed. 913, this Court struck down, attempts at legislative price-fixing for personal services. In *Wilson* v. *New*, 243 U. S. 332, 61 L. ed. 735, the Court disclaimed such power except to meet the temporary emergency of a threatened railroad strike.

In a different class are Minimum Wage Laws.

West Coast Hotel Company v. *Parrish*, 300 U. S. 379, 81 L. ed. 703;
United States v. *Darby Lumber Co.*, — U. S. —, 85 L. ed. 395, Feb. 3, 1941.

In *O'Gorman & Young* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 75 L. ed. 324, this Court upheld a statute of the State of New Jersey forbidding the insurer to allow its agents any commission "in excess of a reasonable amount" or in excess of that "allowed to any one of its local agents." The Legislature did not even fix the rate of commission to be charged, but, this Court, in a five to four decision, at page 257, laid stress upon the fact that the insurance business was "so far affected with the public interest that the State may regulate the rates. German Alliance Insurance Co. v. Lewis, 233 U. S. 389." The Court was dealing with an industry which traditionally was subjected to far-reaching regulations of various kinds, including rate-fixing. So far was this true that the business was quite generally carried on under the supervision of a superintendent of insurance, or some corresponding state official. The Court, accordingly, held the statute to be valid because "the agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged to the insured" (p. 257).

In the case of *Tagg Bros. and Moorhead* v. *United States,* 280 U. S. 420, 74 L. ed. 524, the Court dealt with a provision of the Packers and Stockyard Act, under which the Secretary of Agriculture determined just and reasonable rates and charges by "market agencies" of stockyards. The case should be read in the light of *Stafford* v. *Wallace,* 258 U. S. 495, 66 L. ed. 735, as to the character of the industry in question. The Court held in the *Tagg Bros.* case that the statute and the orders issued by the Secretary of Agriculture, fixing charges by market agencies, was valid, but laid particular emphasis upon the fact that these agencies had a monopoly and were accustomed to fix prices by agreement among themselves. Upon this point, the Court said, at pages 438-9:

> "There is nothing in the nature of monopolistic personal services which make it impossible to fix reasonable charges to be made therefor; * * *.
>
> "Plaintiffs perform an indispensable service in the interstate commerce in livestock. They enjoy a substantial monopoly at the Omaha stockyards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry. The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce. (Citing cases.)"

Thus far, and thus far only, has this Court gone in fixing maximum charges for personal services.

The case of *Townsend* v. *Yeomans,* 301 U. S. 441, 81 L. ed. 1210, which sustained a statute fixing charges to be made by tobacco warehouses, is not a case involving personal services, in the sense in which we use the term, but is more akin to the decision in *Munn* v. *Illinois,* 94 U. S. 113, 24 L. ed. 77, involving rates to be charged by grain elevators.

The question, therefore, arises as to whether this Court at this time is prepared to narrow the field of constitutional liberty and enlarge the area of statutory regimentation by upholding a statute which fixes the maximum fees which may be charged by employment exchanges. To overrule the *Ribnik* decision would be to take a long step in this direction.

In the case of employment exchanges, and particularly those providing employment for executives, technicians and professional men, services rendered are not capable of standardization without arbitrariness, as has already been found by this Court, and as was found in effect by the Nebraska Supreme Court in the case at bar. In referring to previous cases in this Court, including the *Ribnik* case, the majority opinion by Mr. Justice ROBERTS in *Nebbia* v. *New York*, 291 U. S. 502, 78 L. ed. 940, states at pages 536-537:

> "These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect."

Legislative limitation on maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs.

This argument showing the impracticability and injustice of such regulation is entitled to special consideration in an industry which is subject to subsidized competition from free public employment exchanges in almost every section of the nation, so that the evil of excessive charges, whatever may have been the extent of its existence in the past, can no longer conceivably exist. Surely no one wishes unnecessarily to destroy the liberty of people to serve and be served on terms agreed upon or to reduce unnecessarily the circle of constitutional liberty.

We proceed, therefore, to elaborate these points.

An employment exchange may serve all classes of people, including those capable of service for which there is a great demand, and those having no particular bent who may approach the class of unemployables. The clerical, executive, technical and professional groups, more than some others, elude standardization. If there is a fixed maximum fee, and no opportunity to recover disbursements, the tendency of the employment exchange will be to serve those for whom jobs may be secured with little effort, and to refrain from spending the extra amount of time, energy, resourcefulness and money which may be necessary to secure work for those whom it is difficult to place. Under the present emergency, it is easy to secure work for a toolmaker, because the country is in great need of toolmakers, but the fee to be collected by the agency for the easy task of placing the toolmaker will be ten per cent of the high monthly wages of that toolmaker. On the other hand, it is still difficult, in view of the great amount of unemployment, to secure employment for unskilled men, but, under the terms of the Nebraska Statute, if an agency spends a great deal of time, effort and money to find employment for such men, it will receive therefor only ten per cent of the monthly wages of the unskilled craftsman—or less compensation for more work. The same argument applies to handicapped or elderly employees. It is difficult to place such men, and when they are placed their actual wages are small. A statute which operates in such a way is essentially arbitrary and unreasonable, and is against the public interest, because it decreases the opportunities of employment for those who are particularly in need of such a service.

Legislative recognition of the necessity of flexible provisions in respect to handicapped employees, if arbitrariness is to be avoided, is to be found in Section 14 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. Sec-

tion 214, dealing with the minimum wages of learners, apprentices and handicapped workers, and in the Washington minimum wage law involved in the decision of this Court in *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 387, 81 L. ed. 703, 706. We submit moreover that the general application of such laws unqualifiedly to professional and executive workers would not be sustainable as a valid exercise of constitutional power.

Let it also be remembered that time is of the essence for those seeking employment, and for them it is far cheaper to pay extra fees to cover extra speed, energy, and cost than to wait weeks for a result. Perhaps, it is that fact alone which has kept the private agency alive in the face of subsidized competition. We submit that regulations which destroy flexibility and efficiency and prevent adequate service in such activities are arbitrary and void and detrimental to public welfare.

Nor is it to be forgotten that the same Act gives the person served by the agency the power, by wanton caprice, to escape payment for services fully rendered, by requiring the agency to return fees for such rendered service whenever the employee arbitrarily decides not to accept the "delivered goods". It also permits the employee arbitrarily to terminate the employment short of a week, and thus prevent the agency from receiving or retaining compensation in excess of the $2.00 registration fee. We submit that these arbitrary restrictions are inseparable parts of the fee fixing provisions and emphasize the invalidity of this act as applied to employment exchanges which limit their business to clerical, executive, technical and professional workers. Are these classes to be treated as wards of the state by denying them the right of freedom of contract in such matters?

The lack of any evil or mischief to be remedied by any such drastic and arbitrary legislation emphasizes the infirmity of these provisions. Since the time when the *Rib-*

nik case was decided, public employment exchanges have grown apace. The public reports in respect to employment exchanges referred to by the petitioner, and referred to in previous dissenting opinions in this Court, are largely out of date. They do not reflect current conditions as affected by the present degree of competition from free public agencies subsidized by the State and Federal governments.

It is significant that while the Twelfth (1909-1910), the Fourteenth (1913-1914) and the Fifteenth (1915-1916) Biennial Reports of the Bureau of Labor of the State of Nebraska quoted in petitioner's brief (pages 52-54) refer to certain alleged abuses by private employment agencies, the Twenty-seventh (1936-1938) and the Twenty-eighth (1938-1940) Biennial Reports of the Nebraska Department of Labor make no reference to such abuses although both reports deal with private employment agencies. This apparent disappearance of these abuses may well be explained by the recent growth in the activities of the Federal-State employment agencies in Nebraska as set forth later in this brief.

In 1933 the Wagner-Peyser Act, 29 U. S. C. A., Secs. 49 to 49-1 inclusive, was passed, providing for the establishment and maintenance of a national system of public employment offices, under the direction of the United States Employment Service. This Act provides that such sums shall be appropriated by Congress as may be deemed necessary for the maintenance of these public employment agencies, to be apportioned among the several States, and that no payment shall be apportioned to any State until an equal sum has been made available by that State (Section 49-d).

In *Planning and Administration of Unemployment Compensation in the United States,* by Bryce M. Stewart, published by Industrial Relations Counselors, Inc. of New York, in 1938, we find the following:

"At the time of the passage of the Wagner-Peyser Act twenty-four states and the District of Columbia were maintaining employment services, many of which were on only a nominal basis, and there were about 135 state employment offices in operation. By December 31, 1936, thirty-seven states had affiliated with the United States Employment Service, one state was in the process of affiliating, eight others had accepted the Wagner-Peyser Act but taken no further action, and only two states, Kansas and Montana, were not affiliated.

• • •

"By the middle of 1937 forty-three states had affiliated; three had accepted the Wagner-Peyser Act but taken no further action; one was still in the process of affiliating; and one other, Montana, was not affiliated and had taken no action." Chapter VIII, page 206.

The 1940 Annual Report of the Social Security Board states, at page 69:

"The establishment of the Unemployment Compensation Program has resulted in an increase in the use of public employment services by employers and workers who did not previously use them extensively, especially in connection with 'white collar' jobs and skilled labor."

In the same report it appears that on June 30, 1940 there were 1,492 local offices of State Employment Services and, in addition, 3,115 points at which itinerant service was provided. The active file of these employment offices showed the registration of 5.7 million job seekers. During the year these offices received 16.2 million applications for work, including new applications and renewed applications, and placements were more than 3.5 million. Nearly three million complete placements were in private employment

of which 1.5 million were in "regular private employment," that is, in employment expected to last more than a month. Nearly 700,000 placements were made in skilled and semi-skilled jobs. Placements in white collar jobs numbered some 415,000 of which 224,000 were in sales jobs, 156,000 were in clerical jobs and nearly 35,000 were in professional and technical jobs (page 69). In addition to these complete placements the offices participated in 1.1 million supplementary placements, that is, in placements in which the service was instrumental in bringing the employer and worker together, although the service did not itself perform all the steps in the placement. During the year members of employment service staffs made 2.1 million visits to employers to explain the facilities of the service and inquire about job openings. Services for the placement of teachers were established several years ago on a centralized basis in five states, including Nebraska (pages 69, 70).

For the fiscal year ended June 1939, Congress appropriated $1,950,000 and for the fiscal year ended June 1940, $3,480,000, to support these free public employment agencies. Under the requirement of the law the State governments were obliged to contribute an equal amount for the support of these governmental agencies. In addition to all of these appropriations each State receives a subsidy from the Social Security Fund for the support of public employment agencies and furthermore the postage on all mail sent out from Federal-State employment offices is paid for by the Social Security Board.

The Federal-State offices through their outside contact men and women and otherwise try to interest employer and employee. They advertise in the newspapers. To be eligible for unemployment insurance the unemployed must register with a public agency. This special competition given the private agencies by the free public agencies is further emphasized by the following statement on page 2

of the *Labor Information Bulletin* of December 1937, issued by the Bureau of Labor Statistics of the United States Department of Labor:

> "The public employment offices as a part of the State unemployment-compensation system have a big part to play. The States require that unemployment compensation shall be paid through public employment offices, and to be eligible for benefit payments the unemployed worker must register at such an office and fulfill certain requirements of the law."

Now there are Federal-State Employment Offices in all the States and in the District of Columbia, Alaska and Hawaii (Social Security Board Annual Report, 1940, p. 186).

The part that this competition plays in Nebraska appears also in the Twenty-seventh and Twenty-eighth Biennial Reports of the Department of Labor of the State of Nebraska.

As of June 30, 1940, there were twenty State-Federal employment offices in the State of Nebraska (Social Security Board Report, 1940, p. 186). The amount apportioned for the Nebraska offices under the Wagner-Peyser Act for the fiscal year 1939-1940 was $37,570.80 (Social Security Board Report, 1940, p. 164). However, this sum, in addition to the equal sum which the State must provide under the Wagner-Peyser Act, apparently represents a small proportion of the money spent in Nebraska in connection with the operation of these Federal-State employment offices. On page 18 of the Twenty-seventh Biennial Report of the Department of Labor of the State of Nebraska, June 1, 1936, to December 1, 1938, it is stated:

> "This law [referring to an Act known as the Unemployment Compensation Law passed at the

1937 session of the Nebraska Legislature] was so framed as to conform with the requirements of Title III and Title IX of the Federal Social Security Act. Under the provisions of this act, due to the fact that all persons applying for Unemployment Compensation benefits must register for work with the Nebraska State Employment Service, funds are provided by the Unemployment Compensation Bureau of the Social Security Board to supplement State and Federal funds matched under the Wagner-Peyser Act, in order that an adequate State employment service may be maintained."

On page 21 of the Twenty-eighth Biennial Report of the Department of Labor of the State of Nebraska, December 1, 1938 to December 1, 1940, it is stated:

"In order to expand the organization [referring to the Nebraska State Employment Service] to meet the requirements for handling this additional work monies were granted by the Social Security Board to the employment service to meet the increased cost of operation. By far the largest part of the cost of operation is met by these grants. For the period July 1, 1939, to December 31, 1940, the ratio is as follows:

Local (County and city)		2%
State (State appropriation to be matched by Wagner-Peyser Fund)		14%
Wagner-Peyser Funds	15%	
Grants from Social Security Board	69%	
Total Federal Money		84%
		100%"

Economic pressure is brought to bear on employee and employer alike to utilize the public employment agencies. The pressure on the employer is set forth on page 18 of the Twenty-seventh Biennial Report of the Department of Labor of the State of Nebraska:

> "It, stands to reason that a fair percentage of the applicants placed will necessarily be claimants for benefits and in this measure the Nebraska State Employment Service will protect the employers' reserves under the Unemployment Compensation fund. Since the Nebraska State Employment Service may in this way protect the employers' reserves, a constant effort has been made during the year 1938 to inform all employers of the part which the Employment Service will play in the protection of their reserves and they have been encouraged to use the Employment Service for the purpose of filling any positions they have vacant in their organizations. By the operation of the system of employers using the Employment Service to the greatest extent possible, they may co-operatively assist themselves in protecting their reserves."

The pressure on the unemployed is stated on page 20 of the Twenty-eighth Biennial Report of the Department of Labor of the State of Nebraska:

> "As a condition to qualification for benefits the act [referring to the Nebraska State Unemployment Compensation Law passed by the 1937 session of the legislature] provides that the employee must register with the employment service and accept suitable employment if available. He is entitled to benefits only in case it is impossible to find other employment. This is the only effective provision which makes it possible to ascertain willingness to work. It would be difficult to attempt to administer unemployment

compensation except through public employment offices. There must, accordingly, be the closest possible connection between the employment offices and the administration of unemployment compensation."

The results of this competition also appear in the official reports. During the fiscal year 1939-1940 the public employment offices in Nebraska received 119,261 applications for employment and made 34,779 placements (Social Security Board Report, 1940, p. 187). The Twenty-eighth Biennial Report of the Nebraska Department of Labor, page 16, gives the following figures as to the activities of the Nebraska State Employment Service from December, 1938 to November, 1940, inclusive:

New applications and renewals	231,507
Total placements	72,453
Private placements	36,738
Public placements	35,715
Farm placements	4,642
Teacher placement division	487

The names of three of the respondents herein indicate that they are teachers agencies. The competition they face in Nebraska from the Public Employment Service is revealed at pages 22 and 23 of the Twenty-eighth Biennial Report of the Nebraska Department of Labor, from which we quote:

"Three years have passed since the establishment of the Teacher Placement Division of the Nebraska State Employment Service, and each year has seen a decided increase in the service rendered to the teachers and school officials in the State. Practically all of the schools and colleges in the state have cooperated in this service.

> "During the past two years a total of 482 placements has been made, showing a gain each year of approximately one-third over each preceding year. * * *
>
> "The average active file of teachers seeking employment or advancement in 1940 was 1,109, which represents an increase of approximately twenty per cent over 1939 and ninety-two per cent over the first year of operation. The total number requesting consideration for positions thus far in 1940 is 2,065. Since January, 1940, 1,139 vacancies have been reported by school officials.
>
> * * * * *
>
> "This service is available to every school district, city, town and rural, in the state. Candidates may also use it for the purpose of having their credentials compiled for future use or made available to the placement bureaus of their own colleges or placement divisions in other states."

Nothing appears in the record to overcome the presumption created as to the results of such inexorable economic forces. Because of this increasing competition of the public employment agencies, as well as the increasing number of charitable, labor union and employer association employment agencies, any tendency of the past toward excessive fees by private employment agencies must have come to an end. Those private agencies which have not been put out of business by competition, publicly subsidized, can no longer hope to collect excessive fees.

Mr. Justice STONE in the dissenting opinion in *Ribnik* v. *McBride*, 277 U. S. 350, at page 360, stated that price regulation was within a state's power

> "whenever any *combination of circumstances* seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might *reasonably* anticipate serious consequences to the community as a whole." (Italics ours.)

At pages 373-374 in the same opinion he further said:

> "To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered."

This statement seems to be in complete harmony with the statement of this Court in *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

In *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 535-6, 67 L. ed. 1103, 1108, the Court deals, in detail, with the classification of industries which may be subject to price regulation, and points to the fact that this includes a group of occupations which may be subject to such changing circumstances as to result in their being transferred to the group which is affected with the public interest. On this point, the Court said:

> "Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some Government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them."

and again:

> "The circumstances of its alleged change from the status of private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry."

This opinion in the *Wolff* case has been repeatedly relied upon by this Court as stating the fundamental principles involved.

Tyson & Bro. v. *Banton,* 273 U. S. 418, 431, 71 L. ed. 718, 723;
Ribnik v. *McBride,* 277 U. S. 350, 355, 72 L. ed. 913, 915;
Williams v. *Standard Oil Co.,* 278 U. S. 235, 239; 73 L. ed. 287, 308;
New State Ice Co. v. *Liebman,* 285 U. S. 262, 277, 76 L. ed. 747, 753;
Nebbia v. *New York,* 291 U. S. 502, 536, 78 L. ed. 940, 956.
Old Dearborn Distributing Co. v. *Seagram-Distillers Corp.,* 299 U. S. 183, 192, 81 L. ed. 109, 118;

Other cases indicate that the limits of constitutional power in cases of this character may hinge on changing conditions in respect to the evil or emergency justifying such a drastic intrusion on liberty.

Wilson v. *New,* 243 U. S. 332, 61 L. ed. 755;
Block v. *Hirsh,* 256 U. S. 135, 65 L. ed. 865;
Marcus Brown Holding Co. v. *Feldman,* 256 U. S. 170, 65 L. ed. 877;
Pennsylvania Coal Co. v. *Mahon,* 260 U. S. 393, 67 L. ed. 322.

As applied to the case at bar, it seems apparent that if the "peculiar relation to the public" of this industry was not such as to subject it to price-fixing regulation in 1928, it certainly is even less so today, by reason of the greater prevalence of subsidized governmental employment exchanges, which, by and large, prevent any company from successfully charging excessive fees.

The findings by the Supreme Court of Nebraska, confirming these contentions, include the following (R. 17-18):

> "While for many years employment agencies have been created by many states, civic and labor organizations, to which those unemployed might resort without charge to them, this field has been vitally enlarged upon by both the federal governme[illegible] and the states, and such other organizations as previously mentioned, to such extent that it is apparent that the business of an employment agency is distinctively one of a highly competitive nature. An attempt to establish a uniform fee for a valuable service and less valuable service, without the expense of overhead, would seem to be hopelessly impracticable, within the limits of constitutional rights.
>
> The relator is engaged in a beneficial business. Constituting part of its property are services rendered in obtaining employment. One is not obligated, nor is it compulsory, to employ relator, and the person seeking to avail himself of such services is at liberty to reject them, if the terms of the contract for compensation are not satisfactory."

POINT II.

If this Court should hold that the present record does not justify an affirmance of the decision of the State Court this cause should be remanded for trial on the merits.

Should this Court be of the opinion that the statute in question is not invalid on the present showing, the proceeding in the Court below should not be ordered dismissed but this cause should be remanded for trial on the facts. All that the petitioner herein sought by his petition for certiorari was that this Court reverse the decree

of the Supreme Court of the State of Nebraska granting mandamus on a motion for judgment on the pleadings made by the respondent in the Court below (petition for certiorari, p. 5). There is no request that this Court grant the petitioner judgment on the pleadings dismissing the petition in the Court below. A motion for judgment on the pleadings is in the nature of a demurrer involving only questions of law raised on the face of the pleadings, where proof of facts is not permissible.

First National Bank of Wellston v. *Conway Road Estates Co.*, 94 F. (2nd) 736 (C. C. A. 8th Cir. 1938), certiorari denied *Conway Road Estates Co.* v. *First National Bank of Wellston*, 304 U. S. 578, 82 L. ed. 1541;

Consolidated Indemnity & Ins. Co. v. *Alliance Casualty Co.*, 68 F. (2nd) 21 (C. C. A. 2nd Cir. 1933);

Klink v. *Chicago, R. I. & P. Ry. Co.*, 219 F. 457 (C. C. A. 8th Cir. 1915);

Van Etten v. *Kosters*, 48 Neb. 152, 66 N. W. 1106;

Webster v. *City of Hastings*, 56 Neb. 669, 77 N. W. 127;

Abraham v. *Studebaker Corporation*, 113 Neb. 721, 204 N. W. 786.

It is true that a motion for judgment on the pleadings admits either directly or impliedly the truth of all well pleaded facts in the pleading of the opposing party but it does not admit conclusions of the pleader. The allegation in the answer that the business of a private employment agency in Nebraska is vitally affected with a public interest is a conclusion of law and is therefore not admitted.

Newport News Shipbuilding & Dry Dock Co. v. *Schauffler*, 303 U. S. 54, 82 L. ed. 646.

Likewise, if it be determined that the statute cannot be held to be invalid in the absence of outside evidence, the allegation in the petition in the Court below to the effect that it is unconstitutional as a violation of the due process clause of the Fourteenth Amendment is an averment to be supported by proof of appropriate facts.

In *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 81 L. ed. 1143, Mr. Chief Justice HUGHES said, at page 353:

> "Constitutional questions are not to be decided hypothetically. When particular facts control the decision they must be shown."

In the majority opinion in *Nebbia* v. *New York,* 291 U. S. 502, 78 L. ed. 941, it is stated, at page 525:

> "* * * And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. It results that a regulation valid for one sort of business, or in given circumstances, may be invalid for another sort, or for the same business under some other circumstances, *because the reasonableness of each regulation depends upon the relevant facts.* * * *" (Italics ours.)

This is not a case where a trial has been held on the merits and the respondents here failed to offer certain necessary proof. They should not be deprived of their day in Court where they have raised only a question of law by motion.

This Court has held that where justice requires it, a cause may be remanded to take proof of further facts.

> *State of Missouri ex Rel. Wabash Railway Company* v. *Public Service Commission of Missouri,* 273 U. S. 126, 71 L. ed. 575;
>
> *Villa* v. *Van Schaick,* 299 U. S. 152, 81 L. ed. 91.

CONCLUSION

We submit, for the reasons above set forth, that the *Ribnik* case should not be overruled, and the decision of the Supreme Court of Nebraska should not be reversed, but in the event that this Court should find that such a conclusion cannot be reached without additional proof of pertinent facts, the cause should not be dismissed but should be remanded to the State Court for trial.

Respectfully submitted,

WALTER GORDON MERRITT,
Counsel for Respondents.

APPENDIX

Section 48-508, Compiled Statutes of Nebraska 1929:

"A registration fee not to exceed two dollars may be charged by such licensed agency when such agency shall be at actual expense in advertising such individual applicant, or in looking up the reference of such applicant. In all such cases a complete record of such references shall be kept on file which record shall, during all business hours, be open for the inspection of the secretary of labor, the chief deputy secretary of labor, or any other inspector appointed by the secretary of labor to make such inspection, and upon demand shall be subject to the inspection and examination by the applicant. For such registration fee a receipt shall be given to said applicant for help or employment, giving name of such applicant, date of payment and character of position or help applied for. Such registration fee shall be returned to said applicants on demand, after thirty days and within sixty days from date of receipt, less the amount that has been actually expended by said licensed agency for said applicant, and an itemized account of such expenditures shall be presented to said applicant on request at the time of returning the unused portion of such registration fee, provided no position has been furnished by said licensed agency to and accepted by said applicant. No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of

which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the . st month's service growing out of said employment furnished by said employer. Provided, however, that if through no fault of said applicant or employee, he fails to remain in service with said employer and other positions or places of employment are furnished to said applicant by said licensed agency, then said licensed agency shall not accept, collect or charge more than one fee every three months,' but the further fee aforesaid shall not be received by such licensed person before the applicant has been tendered a position by said licensed person. In the event that the position, so tendered, is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor. No such licensed person shall send out any applicant for employment without having obtained a BONA FIDE order therefore, and if it shall appear that no employment of the kind applied for existed at the place where said applicant was directed, said licensed person shall refund to such applicant within five days after demand, any sum paid by such applicant for transportation in going to and returning from said place and all fees paid by said applicant. In addition to the receipt provided to be given for registration fee it shall be the duty of such licensed person to give, to every applicant for employment from whom other fee or fees shall be received, an additional receipt, in which shall be stated the name of such applicant, the date and amount of such other fees; and to every applicant for help from whom other fee or fees shall be received, an additional receipt, stating the name and address of said applicant, the date and amount of such other fee or fees and the kind

of help to be provided. All receipts shall have printed on the back thereof, in the English language, the name and address of the state secretary of labor and the chief deputy secretary of labor. Every such licensed person shall give to every applicant for employment, a card or printed paper containing the name of the applicant, the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment. If an employee furnished fails to remain one week in a situation, through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand (1921 p. 704; C. S. 1922, 7734)."

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SUPREME COURT OF THE UNITED STATES.

No. 671.—October Term, 1940.

O. M. Olsen, Secretary of Labor of the State of Nebraska, Petitioner,
vs.
State of Nebraska, *ex rel.* Western Reference & Bond Association, Inc., et al.

On Writ of Certiorari to the Supreme Court of the State of Nebraska.

[April 28, 1941.]

Mr. Justice Douglas delivered the opinion of the Court.

In reliance upon *Ribnik* v. *McBride*, 277 U. S. 350, the Supreme Court of Nebraska held, one judge dissenting, that a statute of that state fixing the maximum compensation which a private employment agency might collect from an applicant for employment[1]

[1] Neb. Comp. Stat. 1929, § 48-508:

"Private Employment Agencies, Registration Fee. A registration fee not to exceed two dollars may be charged by such licensed agency when such agency shall be at actual expense in advertising such individual applicant, or in looking up the reference of such applicant. In all such cases a complete record of such references shall be kept on file which record shall, during all business hours, be open for the inspection of the secretary of labor, the chief deputy secretary of labor, or any other inspector appointed by the secretary of labor to make such inspection, and upon demand shall be subject to the inspection and examination by the applicant. For such registration fee a receipt shall be given to said applicant for help or employment, giving name of such applicant, date of payment and character of position or help applied for. Such registration fee shall be returned to said applicants on demand, after thirty days and within sixty days from date of receipt, less the amount that has been actually expended by said licensed agency for said applicant, and an itemized account of such expenditures shall be presented to said applicant on request at the time of returning the unused portion of such registration fee, provided no position has been furnished by said licensed agency to and accepted by said applicant. No licensed person or persons shall, as a condition to registering or obtaining employment for such applicant, require such applicant to subscribe to any publication or exact other fees, compensation or reward, other than the registration fee, aforesaid, and a further fee, the amount of which shall be agreed upon between such applicant and such licensed person, to be payable at such time as may be agreed upon in writing, 'the amount of which, together with said registration fee of $2.00 added thereto shall in no case exceed 10 per cent of all moneys paid to or to be paid or earned by said applicant, for the first month's service growing out of said employment furnished by said employer. *Provided, however,* that if through no fault of said applicant or employee, he fails to remain in service with said employer

was unconstitutional[2] under the due process clause of the Fourteenth Amendment. 138 Neb. 574, 293 N. W. 393. The case is here on a petition for certiorari which we granted because of the importance of the constitutional question which was raised.

The action is for a peremptory writ of mandamus ordering petitioner, Secretary of Labor of Nebraska, to issue a license to the relator[3] to operate a private employment agency for the year commencing May 1, 1940. The license was withheld because of relator's refusal to limit its maximum compensation, as provided by

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and other positions or places of employment are furnished to said applicant by said licensed agency, then said licensed agency shall not accept, collect or charge more than one fee every three months,' but the further fee aforesaid shall not be received by such licensed person before the applicant has been tendered a position by said licensed person. In the event that the position, so tendered is not accepted by or given such applicant, said licensed person shall refund all fees requested by said applicant, other than the registration fees aforesaid within three days after demand is made therefor. No such licensed person shall send out any applicant for employment without having obtained a *bona fide* order therefor, and if it shall appear that no employment of the kind applied for existed at the place where said applicant was directed, said licensed person shall refund to such applicant within five days after demand, any sum paid by such applicant for transportation in going to and returning from said place and all fees paid by said applicant. In addition to the receipt provided to be given for registration fee it shall be the duty of such licensed person to give, to every applicant for employment from whom other fee or fees shall be received, an additional receipt, in which shall be stated the name of such applicant, the date and amount of such other fees; and to every applicant for help from whom other fee or fees shall be received, an additional receipt, stating the name and address of said applicant, the date and amount of such other fee or fees, and the kind of help to be provided. All receipts shall have printed on the back thereof, in the English language, the name and address of the state secretary of labor and the chief deputy secretary of labor. Every such licensed person shall give to every applicant for employment, a card or printed paper containing the name of the applicant, the name and address of such employment agency, and the written name and address of the person to whom the applicant is sent for employment. If an employee furnished fails to remain one week in a situation, through no fault of the employer, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employer upon demand. If the employment furnished the applicant does not continue more than one week, through no fault of the employee, then all fees paid or pledged, in excess of the registration fee aforesaid, shall be refunded to the employee upon demand."

[2] The court upheld those provisions of the statute under § 3, Art. I of the Nebraska Constitution which provides that "No person shall be deprived of life, liberty, or property, without due process of law." See Art. XV, § 9.

[3] The petition in mandamus was filed by respondent Western Reference & Bond Assn., Inc. The other respondents are Mills Teachers Agency, Thomas Employment Service, Co-Operative Reference Co., Marti Reference Co., Watts Reference Co., Cornhusker Teachers Bureau, Grace Boomer, and Davis School Service, who intervened in the action and challenged the constitutionality of the act. Their petition of intervention stated that they, as well as the relator, confine their business "to soliciting and securing positions for clerical, executive, technical and professional workers, and do not engage in the business of securing placements for common laborers, domestic servants or other classes of unskilled workers." That seems to be conceded.

the statute, to ten per cent of the first month's salary or wages of the person for whom employment was obtained. The petition in mandamus challenged the constitutionality of those provisions of the act.[4] The answer sought to sustain them by alleging that the business of a private employment agency is "vitally affected with a public interest" and subject to such regulation under the police power of the state. The relator's motion for judgment on the pleadings was sustained and it was ordered that a peremptory writ of mandamus should issue.

We disagree with the Supreme Court of Nebraska. The statutory provisions in question do not violate the due process clause of the Fourteenth Amendment.

The drift away from *Ribnik* v. *McBride, supra*, has been so great that it can no longer be deemed a controlling authority. It was decided in 1928. In the following year this Court held that Tennessee had no power to fix prices at which gasoline might be sold in the state. *Williams* v. *Standard Oil Co.*, 278 U. S. 235. Save for that decision and *Morehead* v. *Tipaldo*, 298 U. S. 587, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the states and of Congress.[5] *Tagg Bros.* v. *United States*, 280 U. S. 420, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931 a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. *Nebbia* v. *New York*, 291 U. S. 502. And see *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163; *Borden's Farm Products Co., Inc.* v. *Ten Eyck*, 297 U. S. 251. Cf. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511;

[4] By stipulation filed in the state court it was agreed that the "sole and only issue for determination" was the constitutionality of the act "in so far as the same fixes or limits the fees or compensation of private employment agencies."

[5] But see New State Ice Co. v. Liebmann, 285 U. S. 262; Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U. S. 183, 192; Carter v. Carter Coal Co., 298 U. S. 238, 316.

Mayflower Farms, Inc. v. *Ten Eyck*, 297 U. S. 266. In 1937 *Adkins* v. *Children's Hospital*, 261 U. S. 525, was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. In the same year *Townsend* v. *Yeomans*, 301 U. S. 441, upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. Cf. *Mulford* v. *Smith*, 307 U. S. 38; *Currin* v. *Wallace*, 306 U. S. 1. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938. *United States* v. *F. W. Darby Lumber Co.*, 312 U. S. —. These cases represent more than scattered examples of constitutionally permissible price-fixing schemes. They represent in large measure a basic departure from the philosophy and approach of the majority in the *Ribnik* case. The standard there employed, following that used in *Tyson & Brother* v. *Banton*, 273 U. S. 418, 430 *et seq.*, was that the constitutional validity of price-fixing legislation, at least in absence of a so-called emergency,[6] was dependent on whether or not the business in question was "affected with a public interest". Cf. *Brazee* v. *Michigan*, 241 U. S. 340. It was said to be so affected if it had been "devoted to the public use" and if "an interest in effect" had been granted "to the public in that use". *Ribnik* v. *McBride*, *supra*, p. 355. That test, labelled by Mr. Justice Holmes in his dissent in the *Tyson* case (273 U. S. at p. 446) as "little more than a fiction", was discarded in *Nebbia* v. *New York*, *supra*, pp. 531-539. It was there stated that such criteria "are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices", and that the phrase "affected with a public interest" can mean "no more than that an industry, for adequate reason, is subject to control for the public good." *Id.*, p. 536. And see the dissenting opinion in *Ribnik* v. *McBride*, *supra*, at p. 359.

[6] Cf. Highland v. Russell Car & Snow Plow Co., 279 U. S. 253.

The *Ribnik* case, freed from the test which it employed, can no longer survive. But respondents maintain that the statute here in question is invalid for other reasons. They insist that special circumstances must be shown to support the validity of such drastic legislation as price-fixing, that the executive, technical and professional workers which respondents serve have not been shown to be in need of special protection from exploitation, that legislative limitation of maximum fees for employment agencies is certain to react unfavorably upon those members of the community for whom it is most difficult to obtain jobs, that the increasing competition of public employment agencies and of charitable, labor union and employer association employment agencies have curbed excessive fees by private agencies, and that there is nothing in this record to overcome the presumption as to the result of the operation of such competitive, economic forces. And in the latter connection respondents urge that since no circumstances are shown which curb competition between the private agencies and the other types of agencies, there are no conditions which the legislature might reasonably believe would redound to the public injury unless corrected by such legislation.

We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which "should be left where . . . it was left by the Constitution—to the States and to Congress." *Ribnik* v. *McBride, supra,* at p. 375, dissenting opinion. There is no necessity for the state to demonstrate before us that evils persist despite the competition which attends the bargaining in this field. In final analysis, the only constitutional prohibitions or restraints which respondents have suggested for the invalidation of this legislation are those notions of public policy embedded in earlier decisions of this Court but which, as Mr. Justice Holmes long admonished, should not be read into the Constitution. *Tyson & Brother* v. *Banton, supra,* at p. 446; *Adkins* v. *Children's Hospital, supra,* at p. 570. Since they do not find expression in the Constitution, we cannot give them continuing vitality as standards by which the constitutionality of the economic and social programs of the states is to be determined.

The judgment is reversed and the cause is remanded to the Supreme Court of Nebraska for proceedings not inconsistent with this opinion.

It is so ordered.